Supreme Court, U.S.
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No. 93-

In the Supreme Court of the United States

OCTOBER TERM, 1993

LESTER V. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 8, 1994

QUESTIONS PRESENTED

1. Whether a defendant in a criminal trial is entitled upon request, under the Fifth Amendment due process clause and the Sixth Amendment right to jury trial, to have the trial court explain to the jury the meaning of the constitutional principle that a defendant may not be convicted except upon proof beyond a reasonable doubt.

2. Whether a defendant in a criminal trial is entitled upon request, under the Fifth Amendment due process clause, the Sixth Amendment right to jury trial, and the Sixth Amendment right to counsel, to present appropriate arguments to the jury, through counsel, on the meaning of the constitutional principle that a defendant may not be convicted except upon proof beyond a reasonable doubt.

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OPINIONS AND ORDERS BELOW

The unpublished opinion *per curiam* of the United States Court of Appeals for the Fourth Circuit affirming petitioner's conviction, dated April 13, 1994, is reprinted at App. 1a. This opinion is also available on LEXIS at 1994 U.S. App. LEXIS 7149, and on WESTLAW at 1994 WL 126775. The unpublished order of the court of appeals denying petitioner's request for an *en banc* hearing, dated June 7, 1993, is reprinted at App. 7a. The unpublished judgment reflecting petitioner's conviction and sentence, entered by the United States District Court for the District of Maryland on September 30, 1992, is reprinted at App. 9a. The unpublished opinion and order of the district court denying petitioner's motion for bond pending appeal, dated November 12, 1992, is reprinted at App. 15a. The unpublished order of the district court ordering that petitioner be released from prison and serve out the remainder of his term under supervised probation, dated June 23, 1993, is reprinted at App. 19a.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the judgment below by a writ of certiorari pursuant to 28 U.S.C. § 1254 (1988). The judgment of the court of appeals was rendered on April 13, 1994. App. 1a. This petition is therefore timely pursuant to 28 U.S.C. § 2101(c) (1988) and SUP. CT. R. 13.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the construction of the Fifth Amendment's guarantee that "[n]o person shall . . . be deprived of life, liberty, or property, without due process

of law," U.S. CONST. Amend. V, and the Sixth Amendment's guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . . and [the right] to have the Assistance of Counsel for his defence," U.S. CONST. Amend. VI.

STATEMENT OF THE CASE

Petitioner Jones, then an attorney practicing in Harford County, Maryland, was indicted on October 18, 1990 on two counts of tax evasion for the tax years 1983 and 1984. On March 21, 1991, a superseding indictment added two counts of tax perjury relating to amended returns for 1983 and 1984 that petitioner filed in 1986. The superseding indictment charged that petitioner intentionally failed to report approximately $120,000 and $170,000 in income in 1983 and 1984, respectively, in violation of 26 U.S.C. § 7201 (1988). The indictment further charged that petitioner intentionally understated his income in the amended returns filed in 1986, in violation of 26 U.S.C. § 7206(1) (1988). App. 21a-28a.

Petitioner was tried to a jury before the Honorable Marvin J. Garbis, United States District Judge for the District of Maryland, in July 1991. Following a three-week trial, the jury deliberated for a full week but remained deadlocked on all four counts. Judge Garbis declared a mistrial and petitioner was retried in April 1992 before the Honorable Herbert N. Maletz, a retired judge of the United States Court of International Trade sitting by designation. The main issue at trial was whether petitioner intended to understate his income. The defense did not contest the existence (nor, essentially, the amount) of the understatement. Petitioner did not testify at his retrial, nor

did the defense call any witnesses. Petitioner's entire defense was that the government had failed to carry its heavy burden of proving guilt beyond a reasonable doubt.

At both his first and second trials, petitioner requested that the court instruct the jury on the meaning of the reasonable doubt standard. App. 29a, 32a-34a, 35a. Following Fourth Circuit precedent prohibiting such instructions, both Judges Garbis and Maletz refused to provide the requested instructions. App. 29a, 35a. Judge Garbis, however, expressed his personal agreement that an instruction explaining reasonable doubt should be required:

> I will go further, Mr. Sachs. I think that you are right. I think that -- I am not suggesting that this case should ever get up to appeal. But if it did, I would hope that that would be reversible error not to give it.

App. 29a.

At petitioner's retrial, Judge Maletz also refused to permit petitioner's counsel to present any meaningful argument to the jury on the meaning of the reasonable doubt standard. App. 35a-39a.[1] On April 22, 1992,

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[1] During the opening statement on retrial, counsel used without objection a brief, colloquial "baseball metaphor" to the effect that in a criminal case, unlike in baseball, "a tie doesn't go to the runner. They got to throw us out by a mile." App. 31a. Judge Maletz permitted counsel to repeat this metaphor in closing argument, solely because it was not objected to in opening argument. App. 39a, 42a. At petitioner's first trial, Judge Garbis had permitted petitioner's counsel to explain the meaning of reasonable doubt during closing argument. App. 30a.

following two days of deliberations, the jury at petitioner's retrial convicted him on the two counts of tax evasion. Petitioner was acquitted on the two counts of filing false amended returns. App. 43a-47a. On September 30, 1992, petitioner was sentenced to eighteen months imprisonment, a $25,000 fine, and a $50 special assessment pursuant to 18 U.S.C. § 3013 (1988). App. 9a-14a.[2]

On appeal, petitioner contended that his conviction should be reversed because his rights under the Fifth and Sixth Amendments were violated by the trial court's refusal to explain the meaning of reasonable doubt to the jury and by the trial court's refusal to permit petitioner's counsel to present any meaningful argument to the jury on the meaning of reasonable doubt. A panel of the United States Court of Appeals for the Fourth Circuit affirmed petitioner's conviction in an unpublished opinion *per curiam* dated April 13, 1994. App. 1a-6a.[3] In affirming petitioner's conviction, the panel relied on Fourth Circuit precedent holding that trial courts not only are not constitutionally required to explain the meaning of reasonable doubt to the jury, but are prohibited from doing so. App. 3a-6a.[4] The panel also cited Fourth Circuit

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[2] Petitioner began serving his sentence on January 4, 1993. On June 23, 1993, the district court ordered petitioner released and permitted him to serve out the remainder of his term under supervised probation. App. 19a-20a. As a result of his conviction, however, petitioner remains suspended from the practice of law.

[3] On June 7, 1993, the full Fourth Circuit had denied petitioner's request for an *en banc* hearing by a 10-2 vote (Widener and Murnaghan, JJ., dissenting). App. 7a-8a.

[4] The Fourth Circuit has generally prohibited any explanation of reasonable doubt, except "when the jury is 'demonstrably confused or (continued...)

precedent holding that trial courts may prohibit defense counsel from presenting argument to the jury on the meaning of reasonable doubt. App. 6a.

REASONS FOR GRANTING THE PETITION

This case presents a constitutional issue that this Court has never squarely addressed: whether a criminal defendant is entitled upon request, especially in a trial where the sole defense is that the government has failed to sustain its burden of proving guilt beyond a reasonable doubt, to have the *meaning* of that concept explained to the jury.[5] Petitioner's right to such an explanation under the Fifth and Sixth Amendments was violated by the trial court's refusal in this case to instruct the jury on the meaning of reasonable doubt, and by the trial court's refusal to permit petitioner's counsel to present any meaningful argument to the jury on the meaning of reasonable doubt.

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[4] (...continued)
uncertain' and requests such an instruction." *United States v. Russell*, 971 F.2d 1098, 1100 (4th Cir. 1992) (citation omitted), *cert. denied*, 113 S. Ct. 1013 (1993). The Fourth Circuit recently abandoned even that exception to its rule, however, holding that an explanation should not be given even when the jury requests one. *See United States v. Reives*, 15 F.3d 42 (4th Cir. 1994) (affirming trial court's refusal to provide any explanation despite explicit request from jury for "clarification as to 'reasonable doubt'"), *cert. petition filed*, 62 U.S.L.W. 3775 (April 18, 1994) (No. 93-1791).

[5] This issue is sometimes stated as whether reasonable doubt should be "defined" for the jury. Petitioner seeks not merely a "definition" in the narrow dictionary sense, however, but a practical, common-sense *explanation* to convey to lay jurors the *meaning* of this legal term of art.

This Court's recent decision in *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993), held that erroneous definitions of reasonable doubt can *never* be treated as harmless error. This zero-tolerance rule cannot be squared with the reality, as demonstrated by empirical evidence, practical experience, and common sense, that juries deprived of any explanation of reasonable doubt will routinely misdefine it for themselves. *Sullivan* underscores the necessity of explaining reasonable doubt to the jury in order to vindicate the constitutional right to jury trial itself.

The lower federal and state courts are deeply divided over the issue of explaining reasonable doubt to the jury. The ripeness of this issue for resolution by this Court is further underscored by this Court's recent decision in *Victor v. Nebraska*, 114 S. Ct. 1239 (1994), which referred briefly to the issue in dicta but did not explore its ramifications or resolve its application to the type of case presented here.

I. PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO EXPLAIN THE REASONABLE DOUBT STANDARD TO THE JURY

In the landmark case of *In re Winship*, 397 U.S. 358 (1970), this Court held that a criminal defendant may not constitutionally be convicted except upon proof beyond a reasonable doubt. This Court found this requirement implicit in the guarantee of due process of law under the Fifth and Fourteenth Amendments. *Id.* at 361-64. As this Court declared, "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that

leaves people in doubt whether innocent men are being condemned." *Id.* at 364.

> The reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence--that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."

Id. at 363 (citation omitted). *Winship* made clear that a criminal trial jury must, at the very least, be told to apply this vitally important standard of proof. As this Court subsequently held, however,

> [t]he *Winship* doctrine requires *more than simply a trial ritual.* A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence.

Jackson v. Virginia, 443 U.S. 307, 316-17 (1979) (emphasis added).

Only by fully and accurately *explaining* this crucial concept to the jury can the promise of *Winship* and *Jackson* be fulfilled. This constitutional imperative was underscored by this Court's decision in *Sullivan v. Louisiana,* 113 S. Ct. 2078 (1993), which held that a constitutionally erroneous jury instruction on reasonable doubt can *never* be treated as harmless error. To hold otherwise, this Court explained, would eviscerate not only

the right to due process, but the Sixth Amendment right to jury trial itself. As *Sullivan* noted, "[i]t is self-evident . . . that the Fifth Amendment requirement of proof beyond a reasonable doubt [recognized in *Winship*] and the Sixth Amendment requirement of a jury verdict are interrelated." *Id.* at 2081. Where the jury has been improperly instructed on the meaning of reasonable doubt, "there has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 2082.[6] Indeed, this Court, by refusing to apply harmless-error analysis, has singled out the reasonable doubt standard for a level of protection reserved for only a handful of other constitutional guarantees.[7]

The central insight of *Sullivan* is that a failure to properly explain the meaning of reasonable doubt to the jury "vitiates *all* the jury's findings." *Id.* at 2082

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[6] The traditional harmless-error inquiry--"whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error," *id.* at 2081 (emphasis in original)--is thus rendered impossible. An appellate court could only engage in improper speculation as to whether a properly instructed jury "*would surely have found [the defendant] guilty beyond a reasonable doubt.*" *Id.* at 2082 (emphasis in original).

[7] These include the rights to counsel, *see Gideon v. Wainwright*, 372 U.S. 335 (1963), to self-representation, *see McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n.8 (1984), to be tried in public, see *Waller v. Georgia*, 467 U.S. 39, 49-50 & n.9 (1984), or before an impartial judge, *see Tumey v. Ohio*, 273 U.S. 510, 535 (1927), and not to be indicted or convicted by a grand or petit jury chosen with racial bias, *see Batson v. Kentucky*, 476 U.S. 79, 100 (1986); *Vasquez v. Hillery*, 474 U.S. 254, 261-62 (1986); *Whitus v. Georgia*, 385 U.S. 545, 549-50 (1967). By contrast, even so fundamental a right as the Fifth Amendment's prohibition of coerced confessions has been held to be subject to harmless-error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 311-12 (1991).

(emphasis in original). This is because the reasonable doubt standard is the lens through which the jury views all the evidence in a criminal trial. *Sullivan* sets forth a rule of zero tolerance for constitutional defects in that lens due to a faulty definition of the reasonable doubt standard. *Sullivan's* logic applies with equal force to a lens that is out of focus due to the disparate and inaccurate understandings of the reasonable doubt standard by jurors who receive no explanation of that standard at all. In either case the lens through which the jury views the evidence is flawed.

The mere unexplained recitation of the reasonable doubt standard amounts to no more than the empty "trial ritual" condemned by *Jackson,* 443 U.S. at 316-17. Empirical evidence, practical experience, and common sense all compel the conclusion that lay jurors, if deprived of an explanation, will indeed be severely handicapped in trying to "rationally apply that standard to the facts in evidence." *Jackson,* 443 U.S. at 317. As Justice Ginsburg recently noted:

> the argument for defining [reasonable doubt] is strong. While judges and lawyers are familiar with the reasonable doubt standard, the words "beyond a reasonable doubt" are not self-defining for jurors. Several studies of jury behavior have concluded that "jurors are often confused about the meaning of reasonable doubt," when that term is left undefined.

Victor v. Nebraska, 114 S. Ct. 1239, 1253 (1994) (Ginsburg, J., concurring in part and concurring in the judgment), *quoting* Note, *Reasonable Doubt: To Define, or*

Not To Define, 90 COLUM. L. REV. 1716, 1723 (1990). As Judge Anderson of the Ninth Circuit Court of Appeals has observed,

> The phrase "proof beyond a reasonable doubt" is not a self-defining term. It is a nebulous and generalized concept. It is the core feature of every criminal trial. In my view, based upon my experiences, jurors do derive a benefit from a proper definition. It furnishes at least some standard against which they can measure the proof in a particular case. A proper definition furnishes the jury with a concept which they can relate to their own decision-making processes in their daily personal and business lives.

United States v. Witt, 648 F.2d 608, 612 (9th Cir. 1981) (Anderson, J., concurring).

Indeed, the arguments typically asserted against defining or explaining reasonable doubt are premised on two conflicting rationales. On the one hand, it has been argued that the meaning of reasonable doubt is so self-evident, even to laypeople, that no further elaboration is needed.[8] As Justice Ginsburg and Judge Anderson have

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[8] *See, e.g., United States v. Reives*, 15 F.3d 42, 45 (4th Cir. 1994), *cert. petition filed*, 62 U.S.L.W. 3775 (April 18, 1994) (No. 93-1791), *quoting Murphy v. Holland*, 776 F.2d 470, 475 (4th Cir. 1985), *vacated and remanded on other grounds*, 475 U.S. 1138 (1986) ("the term has a 'self-evident meaning comprehensible to a lay juror'"); *United States v. Olmstead*, 832 F.2d 642, 645 (1st Cir. 1987), *cert. denied*, 486 U.S. 1009 (1988) (same).

suggested, this facile premise cannot withstand scrutiny. Empirical studies confirm that the likelihood of jury confusion is disturbingly high.[9] Such studies indicate that, despite this Court's zero tolerance for constitutionally flawed definitions of reasonable doubt, lay jurors deprived of any explanation of that concept will routinely define it for themselves in ways that run afoul of the Constitution.

At the same time, it has been suggested that reasonable doubt is so difficult to define, even by judges and lawyers, that attempts to do so lead inevitably to confusion and misstatement of the concept.[10] Thus, the Fourth Circuit's blanket proscription rests on the implausible assumption that lay jurors can be expected to properly comprehend, without any explanation or

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[9] One study of potential jurors who were given a reasonable doubt instruction with no definition or explanation found that 23 percent believed that if the circumstantial evidence was equally balanced between guilt and innocence, the defendant should be convicted. David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 480-82 (1976), *cited in* Note, *supra*, at 1723 & n.69. Another study of over 600 college students acting as mock jurors, some of whom were given a definition of reasonable doubt and some not, found that "the meaning of the concept of reasonable doubt [was] not obvious to" the subjects and that "[t]here was considerably greater individual uncertainty and group disagreement when reasonable doubt was undefined, and more hung juries resulted." Norbert L. Kerr, *et al.*, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. PERSONALITY & SOCIAL PSYCHOLOGY 282, 292 (1976), *cited in* Note, *supra*, at 1723 & n.66.

[10] *See, e.g.*, *Olmstead*, 832 F.2d at 645 ("the term has eluded clear definition"); *Murphy*, 776 F.2d at 475 ("[i]nstead of improvement, the most likely outcome of attempts to define reasonable doubt is unnecessary confusion and a constitutionally impermissible lessening of the required standard of proof").

illustration, a legal term of art that judges and lawyers struggle to define. *But see, e.g., Lansdowne v. State,* 412 A.2d 88, 93 (Md. 1980) (noting that since even experienced judges "have difficulty construing the meaning of 'reasonable doubt' . . . [s]ome unskilled and untutored lay jurors are at least as likely . . . to misconstrue the meaning"). Judge Torruella of the First Circuit Court of Appeals, noting the "obvious contradiction" of these arguments, has concluded:

> What to me is self-evident is that we would not be engrossed in this debate if the meaning of "proof beyond a reasonable doubt" were as prone to common understanding as is claimed.

United States v. Littlefield, 840 F.2d 143, 151 (1st Cir. 1988) (Torruella, J., concurring), *cert. denied,* 488 U.S. 860 (1988).[11]

Empirical evidence and experience demonstrate, as discussed above, that reasonable doubt is a legal term of art that does not have a self-evident meaning to jurors, and that judges are capable of devising explanations of the concept that will greatly aid the jury's comprehension.

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[11] Chief Judge Newman of the Second Circuit Court of Appeals, criticizing as "curious" the attitude of those courts, like the Fourth Circuit below, which have argued against any explanation of reasonable doubt, notes that he finds it "rather unsettling that we are using a formulation that we believe will become less clear the more we explain it." Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. ___, ___ (1994) (manuscript at 8, *see* App. 51a-52a), *quoted* in *Victor,* 114 S. Ct. at 1253 (Ginsburg, J., concurring in part and concurring in the judgment).

Both Justice Ginsburg and Chief Judge Newman of the Second Circuit Court of Appeals, for example, have advocated use of the instruction proposed in 1987 by the Federal Judicial Center. *See Victor,* 114 S. Ct. at 1253 (Ginsburg, J., concurring in part and concurring in the judgment); Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. ___, ___ (1994) (manuscript at 19-20, *see* App. 52a-54a); FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS 17-18 (1987) (instruction 21).[12] Even if the concept of reasonable doubt were inherently difficult to define, that would hardly justify courts in abandoning the effort altogether. As one scholar has observed:

> Difficulties of the task of describing a degree of belief should not deter the legal profession from attempting a common sense description of that degree. As is aptly said by Right Hon. A.J. Balfour in . . . Foundations of Belief (p. 234): "If we have to find our way over difficult seas and under murky skies without compass or chronometer, we need not on that account allow the ship to drive at random."

J.P. McBaine, *Burden of Proof: Degrees of Belief,* 32 CAL. L. REV. 242, 260 (1944).

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[12] Petitioner does not suggest that this Court should dictate any single explanation of reasonable doubt to this Nation's courts. But for the reasons discussed herein, the Fifth Amendment due process clause and the Sixth Amendment jury trial guarantee require that *some* thorough and balanced explanation of that concept be provided when requested by the defendant (or by the jury itself).

It would be incongruous to guard only against distortions of the reasonable doubt standard resulting from judicial explanations overtly flawed on the surface, while ignoring the misapplications of the standard that necessarily result from refusing to give any explanation at all. The damage to the defendant's constitutional rights is the same in either case. Such a narrow, blinkered approach renders *Winship, Jackson,* and *Sullivan* a triumph of form over substance. Put simply, the rule followed by the Fourth Circuit encourages systematic, widespread constitutional error in the jury room, at the same time that it attempts to sweep such error under the rug and immunize it from review.

In sum, providing the jury with an explanation of reasonable doubt is essential to vindicate both the right to due process of law under the Fifth Amendment and the right to trial by jury under the Sixth Amendment.[13] As Judge Torruella has concluded, "the failure to grant an instruction explaining the term 'proof beyond a reasonable doubt' is an error of constitutional dimension, striking at

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[13] At the very least, this Court should reject the holdings of those courts, like the Fourth Circuit, which rigidly prohibit *any* explanation. This Court should, at the very least, hold that the Constitution requires that trial courts enjoy the discretion to provide an explanation.

Alternatively, this Court should require federal trial courts to explain the concept of reasonable doubt, or should at least protect their discretion to do so, pursuant to this Court's inherent supervisory authority over the lower federal courts. *See, e.g., Frazier v. Heebe,* 482 U.S. 641, 645-46 (1987) (exercising supervisory power to strike down federal district court rule against admission to its bar of attorneys not residing or maintaining offices within the state where the district court sits).

the very heart of the presumption of innocence." *Littlefield,* 840 F.2d at 151 (Torruella, J., concurring).

> Due process principles require that guilt be established beyond a reasonable doubt. Likewise, due process principles require a judge to define that standard adequately for the jury--the group charged with the solemn task of determining guilt or innocence.

United States v. Nolasco, 926 F.2d 869, 874 (9th Cir. 1991) (*en banc*) (Wiggins, J., joined by Pregerson, Alarcon, and Fernandez, JJ., dissenting), *cert. denied,* 112 S. Ct. 111 (1991).

Finally, it is clear under *Sullivan, supra,* that, if the trial court's refusal to explain reasonable doubt to petitioner's jury was error, such error cannot properly be subjected to harmless-error analysis. Even if harmless error analysis were appropriate, the error in this case could not be deemed harmless beyond a reasonable doubt.

II. PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO PERMIT PETITIONER'S COUNSEL TO PRESENT ANY MEANINGFUL ARGUMENT TO THE JURY ON THE MEANING OF THE REASONABLE DOUBT STANDARD

The trial court compounded the constitutional error in this case by not only refusing to explain reasonable doubt to the jury itself, but also by refusing to permit petitioner's counsel to present any meaningful argument to

the jury on the meaning of reasonable doubt.[14] Even if this Court were to deem it constitutionally acceptable for the trial court not to explain reasonable doubt to the jury, this Court should hold, at a bare minimum, that defense counsel must be permitted to include an accurate and proper explanation or illustration of reasonable doubt in arguments to the jury. Refusing to permit such arguments by counsel not only violates the Fifth Amendment guarantee of due process of law and the Sixth Amendment right to jury trial, by obstructing the jury's comprehension of the reasonable doubt standard implicit in that guarantee,[15] it also violates the Sixth Amendment right to counsel.

Argument by counsel is an essential conduit for the enforcement of constitutional guarantees like the reasonable doubt standard. As this Court has held:

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured.

United States v. Cronic, 466 U.S. 648, 653 (1984) (footnote omitted), *quoting Gideon v. Wainwright,* 372 U.S. 335, 344 (1963).

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[14] *See supra* at 3 & note 1.

[15] The argument here is essentially the same as that for requiring the court to explain reasonable doubt to the jury. *See supra* at 6-15.

A key component of the right to counsel is the right to have counsel present argument to the jury. This Court has quoted approvingly Lord Eldon's aphorism that "truth is best discovered by powerful statements on both sides of the question." *See Cronic*, 466 U.S. at 655. "More specifically," this Court has declared,

> the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments. . . .
>
> There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge.

Herring v. New York, 422 U.S. 853, 857-58 (1975).[16]

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[16] This Court held in *Herring* that a defendant has a constitutional right to have his counsel present closing argument even in a bench trial. *Id.* at 859. *See also United States v. Sawyer*, 443 F.2d 712, 713 n.5 (D.C. Cir. 1971) ("The defendant's right to present argument is part of his Sixth Amendment right to counsel and to jury trial.").

Furthermore, while "[t]he trial court has broad discretion in controlling the scope of closing argument[,[17]] [t]hat discretion is abused . . . if the court prevents defense counsel from making a point essential to the defense." *United States v. Sawyer*, 443 F.2d 712, 713 (D.C. Cir. 1971) (finding it error to prevent defense counsel from explaining to the jury the meaning of the legal term "inference" and how to distinguish it from the term "presumption"), *cited with approval by Commonwealth v. Gwaltney*, 387 A.2d 848, 851 (Pa. 1978). In a passage with striking applicability to the instant case, where petitioner's sole defense was that the prosecution failed to carry its burden of proof, the *Sawyer* court noted that "if a single point of law is the linchpin for the defense, there is every reason to permit defense counsel to state the point as emphatically as possible." 443 F.2d at 714. *See also, e.g., Taylor v. State*, 330 So. 2d 91, 93 (Fla. App. 1976):

> [I]t is entirely appropriate for an attorney in closing argument to relate the applicable law to the facts of the case. . . . An attorney should therefore be allowed to explain to the jury those instructions which are relevant to his theory of the case and to emphasize any portion of the jury charge that he feels to be pertinent.

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[17] It is well established that a trial judge has discretion to control the duration, scope, and content of counsel's arguments. There is no right to present arguments which misstate the law or meander on at excessive length. *See, e.g., Herring*, 422 U.S. at 862. But as discussed in text below, that discretion cannot constitutionally extend to denying defense counsel the opportunity to present a thorough, appropriate argument on the meaning of the reasonable doubt standard.

In sum, given the central constitutional importance of the reasonable doubt standard, and the intolerable likelihood that a jury uninformed on the meaning of that standard will be confused and misguided in applying it, *supra* at 9-14, defense counsel cannot, consistently with the Fifth and Sixth Amendments, be denied the opportunity to present a thorough, appropriate argument on the meaning of that standard.[18]

III. THE LOWER FEDERAL AND STATE COURTS ARE DIVIDED BY A DEEP, LONGSTANDING CONFLICT ON THE ISSUE OF EXPLAINING REASONABLE DOUBT TO THE JURY

The existence of a conflict among the federal Courts of Appeals on an important legal issue has always been viewed as a compelling reason for this Court to grant a petition for certiorari. *See, e.g.*, SUP. CT. R. 10.1(a). This case presents a textbook example of such a conflict. While several circuits, like the Fourth Circuit below, condemn or discourage attempts to explain the concept of reasonable doubt, a majority of the circuits either require that the concept be explained, or encourage the use of some explanation while leaving the decision to the discretion of the trial courts.

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[18] Furthermore, as with the trial court's refusal to explain reasonable doubt to the jury, this error cannot, under *Sullivan, supra*, be subjected to harmless-error analysis, and even if harmless-error analysis were appropriate, the error in this case could not be deemed harmless beyond a reasonable doubt.

The Third,[19] Eighth,[20] and Tenth[21] Circuits have long required that trial courts explain the meaning of reasonable doubt to the jury upon request by the defendant. The Second,[22] Sixth,[23] Ninth,[24] and Eleventh[25] Circuits leave the issue to the discretion of the trial courts, while approving, and in some cases strongly encouraging, the use of an explanation. The Second Circuit, for

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[19] *See Blatt v. United States*, 60 F.2d 481 (3d Cir. 1932). *Cf. United States v. Pungitore*, 910 F.2d 1084, 1145 n.87 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2009-11 (1991) (noting in dicta the Fourth and Seventh Circuits' anti-definition rule).

[20] *See Friedman v. United States*, 381 F.2d 155, 160 (8th Cir. 1967).

[21] *See United States v. Pepe*, 501 F.2d 1142, 1143 (10th Cir. 1974). *Cf. Mahorney v. Wallman*, 917 F.2d 469, 473 (10th Cir. 1990) (suggesting in dicta that "a defendant may not be entitled to an instruction defining the fundamental standard of 'reasonable doubt,'" without citing or purporting to undermine *Pepe*); *United States v. Barrera-Gonzales*, 952 F.2d 1269, 1271-72 (10th Cir. 1992) (stating that jury instructions must "provide[] the jury with ample understanding of the issues and standards applicable," citing *Pepe* with approval, and citing a particular explanation of reasonable doubt as "the preferable definition of reasonable doubt").

[22] *See Perez v. Irwin*, 963 F.2d 499, 502 (2d Cir. 1992); *United States v. Ivic*, 700 F.2d 51, 69 (2d Cir. 1983), *overruled on other grounds by National Organization for Women, Inc. v. Scheidler*, 114 S. Ct. 798 (1994).

[23] *See United States v. Goodlett*, 3 F.3d 976, 979 (6th Cir. 1993); *Whiteside v. Parke*, 705 F.2d 869, 872-73 (6th Cir. 1983), *cert. denied*, 464 U.S. 843 (1983).

[24] *See United States v. Nolasco*, 926 F.2d 869, 872 (9th Cir. 1991) (*en banc*), *cert. denied*, 112 S. Ct. 111 (1991) (expressly rejecting Fourth, Fifth, and Seventh Circuit cases "discourag[ing] or even condemn[ing] the use of reasonable doubt definitions").

[25] *See United States v. Veltmann*, 6 F.3d 1483, 1492 (11th Cir. 1993).

example, has described one traditional explanation as "the preferable way of expressing the notion of reasonable doubt." *Perez v. Irwin*, 963 F.2d 499, 502 (2d Cir. 1992). The Ninth Circuit, in an *en banc* decision, has declared that "'a proper definition [of reasonable doubt] is always appropriate.'" *United States v. Nolasco*, 926 F.2d 869, 872 (9th Cir. 1991) (*en banc*), *cert. denied*, 112 S. Ct. 111 (1991), *quoting United States v. Witt*, 648 F.2d 608, 611 (9th Cir. 1981). Furthermore, four of the eleven judges in *Nolasco* went even further and contended, as petitioner does here, that an explanation of reasonable doubt is constitutionally required. *See* 926 F.2d at 873-75 (Wiggins, J., joined by Pregerson, Alarcon, and Fernandez, JJ., dissenting).

The First,[26] Fifth,[27] and District of Columbia[28] Circuits discourage attempts to explain reasonable doubt but also appear to leave the issue to the discretion of the

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[26] *See United States v. Cassiere*, 4 F.3d 1006, 1024 (1st Cir. 1993) ("the district court [is] in the best position to determine whether, and if so how, to define reasonable doubt"); *United States v. Olmstead*, 832 F.2d 642, 644-46 (1st Cir. 1987), *cert. denied*, 486 U.S. 1009 (1988). *But see United States v. Littlefield*, 840 F.2d 143, 151 (1st Cir. 1988), *cert. denied*, 488 U.S. 860 (1989) (Torruella, J., concurring) (urging reconsideration of *Olmstead* and adoption of rule that providing explanation of reasonable doubt is constitutionally required).

[27] *See Thompson v. Lynaugh*, 821 F.2d 1054, 1060-61 (5th Cir. 1987), *cert. denied*, 483 U.S. 1035 (1987).

[28] *See United States v. Taylor*, 997 F.2d 1551, 1557-58 (D.C. Cir. 1993). *Taylor* marked an abrupt departure from the D.C. Circuit's historic rule requiring that trial courts explain the meaning of reasonable doubt to the jury upon request by the defendant. *See Mundy v. United States*, 176 F.2d 32 (D.C. Cir. 1949); *Schencks v. United States*, 2 F.2d 185, 187 (D.C. Cir. 1924).

trial courts. Only the Seventh Circuit joins the Fourth Circuit below in rigidly prohibiting trial courts from explaining reasonable doubt to the jury.[29] Furthermore, the Fourth Circuit's current disdain for explaining reasonable doubt, *see supra* at 4-5, note 4, is sharply at variance with the Fourth Circuit's own historic recognition of the vital importance of such a practice. *See Williams v. United States*, 271 F.2d 703, 705 (4th Cir. 1959) ("it is the duty of the court to define and explain the meaning and application of 'reasonable doubt'").

State jurisdictions reflect this same division. The highest state court in Maryland, where petitioner's federal trial took place, has strongly reaffirmed that jurisdiction's longstanding requirement of explaining reasonable doubt to the jury. *See Lansdowne v. State*, 412 A.2d 88, 91-93 (Md. 1980) (emphasizing the vital constitutional role of the reasonable doubt standard); *accord Wills v. State*, 620 A.2d 295, 298 (Md. 1993). Idaho, Iowa, Massachusetts, Missouri, Nevada, North Carolina, Ohio, Pennsylvania, Rhode Island, Texas, and Washington also require that reasonable doubt be explained to the jury.[30] New York

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[29] *See United States v. Blackburn*, 992 F.2d 666, 668 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 393 (1993).

[30] *See State v. Cotton*, 602 P.2d 71, 74 (Idaho 1979); *State v. Bishop*, 387 N.W.2d 554, 560 (Iowa 1986); *Commonwealth v. Stellberger*, 515 N.E.2d 1207 (Mass. App. 1987); *State v. Antwine*, 743 S.W.2d 51, 62-63 (Mo. 1987), *cert. denied*, 486 U.S. 1017 (1988); *Parker v. State*, 849 P.2d 1062, 1066 (Nev. 1993), *cert. denied*, 114 S. Ct. 570 (1993); *State v. Montgomery*, 417 S.E.2d 742, 748 (N.C. 1992); *State v. Van Gundy*, 594 N.E.2d 604, 606 (Ohio 1992); *Commonwealth v. Young*, 317 A.2d 258, 261-63 (Pa. 1974); *State v. Desrosiers*, 559 A.2d 641, 645 (R.I. 1989); *Geesa v. State*, 820 S.W.2d 154, 161-62 (Tex. Ct. Crim. App. 1991); *State v. Scott*, 757 P.2d 492, 495 n.5 (Wash. 1988).

courts have long employed explanations of reasonable doubt and are required to explain the concept if the jury so requests.[31] Several other jurisdictions approve or strongly encourage the use of some explanation,[32] while still others disapprove explanations.[33]

As this summary demonstrates, the lower federal and state courts are deeply divided on this vital

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[31] *See People v. Antommarchi*, 604 N.E.2d 95, 98 (N.Y. 1992) ("for over 100 years we have approved language defining a reasonable doubt as one which a juror could, if called upon to do so, express or articulate"); *People v. Malloy*, 434 N.E.2d 237, 239 (N.Y. 1982), *cert. denied*, 459 U.S. 847 (1982) (trial court must respond to jury request with meaningful supplemental instruction).

[32] *See People v. Crandell*, 760 P.2d 423, 450 (Cal. 1988), *cert. denied*, 490 U.S. 1037 (1989); *Brown v. State*, 565 So. 2d 304, 307 (Fla. 1990), *cert. denied*, 498 U.S. 992 (1990); *State v. Taylor*, 410 So. 2d 224, 225 (La. 1982); *State v. Tapley*, 598 A.2d 1190, 1192 n.4 (Me. 1991); *People v. Langley*, 466 N.W.2d 724, 726 (Mich. App. 1991); *State v. Goodwin*, 813 P.2d 953, 961 (Mont. 1991), *overruled on other grounds by State v. Turner*, 864 P.2d 235 (Mont. 1993); *State v. Jones*, 245 Neb. 821, 832, ___ N.W.2d ___, 1994 Neb. LEXIS 104, at *20-*21 (1994); *State v. Letendre*, 579 A.2d 1223, 1224 (N.H. 1990); *State v. Manning*, 409 S.E.2d 372, 375 (S.C. 1991), *cert. denied*, 112 S. Ct. 1282 (1992).

[33] *See State v. Bracy*, 703 P.2d 464, 479 (Ariz. 1985), *cert. denied*, 474 U.S. 1110 (1986); *People v. Speight*, 606 N.E.2d 1174, 1177 (Ill. 1992); *State v. Dunn*, 820 P.2d 412, 416 (Kan. 1991); *Byrd v. Commonwealth*, 825 S.W.2d 272, 276 (Ky. 1992); *Barnes v. State*, 532 So. 2d 1231, 1235 (Miss. 1988); *City of Minot v. Rubbelke*, 456 N.W.2d 511, 514 (N.D. 1990); *Rojem v. State*, 753 P.2d 359, 368 (Okla. Ct. Crim. App. 1988), *cert. denied*, 488 U.S. 900 (1988); *State v. Williams*, 828 P.2d 1006, 1017 (Ore. 1992), *cert. denied*, 113 S. Ct. 171 (1992); *State v. McMahon*, 603 A.2d 1128, 1128-29 (Vt. 1992); *Cooper v. Commonwealth*, 345 S.E.2d 775, 777 (Va. App. 1986); *Means v. Sidiropolis*, 401 S.E.2d 447, 451 n.1 (W. Va. 1990); *Collins v. State*, 854 P.2d 688, 699 (Wyo. 1993).

constitutional issue, and need guidance and clarification from this Court. This constitutes a compelling reason why this Court should grant certiorari in this case.

IV. THIS COURT'S RECENT DECISION IN *VICTOR V. NEBRASKA* UNDERSCORES THAT THE ISSUES PRESENTED ARE RIPE FOR CONSIDERATION BY THIS COURT

In the consolidated cases of *Victor v. Nebraska* and *Sandoval v. California,* 114 S. Ct. 1239 (1994), this Court rejected claims that the trial courts involved had provided constitutionally erroneous instructions to the jury on reasonable doubt. Because the trial court in each case did provide an explanation of reasonable doubt, this Court was not presented, as it is here, with the issue of whether the Constitution requires such an explanation. This Court did state in dicta, however, that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Id.* at 1243.

This Court did not otherwise explore the issue and did not address its ramifications in any particular context, such as that presented by petitioner's case in which the sole defense offered at trial was that the prosecution failed to carry the burden of proving guilt beyond a reasonable doubt. Furthermore, the *Victor* dictum, by its very terms, sheds no light on petitioner's related claim that his counsel should have been permitted to present appropriate arguments on the meaning of reasonable doubt. *See supra* at 15-19. The cursory nature of this dictum, an examination of this Court's prior dicta relating to the issue (which demonstrate that this Court has never squarely resolved it), Justice Ginsburg's concurring opinion in

Victor, and the particular context of petitioner's case, all demonstrate that the issues presented are now eminently ripe for plenary consideration by this Court.

First of all, the issues presented in the instant petition were neither raised nor resolved in *Victor*. As this Court has repeatedly held, mere dicta does not have any binding precedential force. *See, e.g., Wainwright v. Witt*, 469 U.S. 412, 422 (1985); *Colgrove v. Battin*, 413 U.S. 149, 158 (1973). As Justice Ginsburg observed in *Victor*, this Court has, in fact,

> never held that the concept of reasonable doubt is undefinable, or that trial courts should not, as a matter of course, provide a definition. Nor . . . have we ever held that the Constitution does not require trial courts to define reasonable doubt.

114 S. Ct. at 1253 (Ginsburg, J., concurring in part and concurring in the judgment).

This Court in *Victor* cited *Hopt v. Utah*, 120 U.S. 430, 440-41 (1887), as support for its dictum on defining reasonable doubt. The *Hopt* Court, however, was very much aware of the need to explain reasonable doubt to the jury, even a century before the *constitutional* nature of the issue was recognized and articulated in *Winship* and *Sullivan*. The *Hopt* Court criticized a Massachusetts court's "definition" of "beyond a reasonable doubt" that merely restated the concept as "to a reasonable and moral certainty." *See id.* at 440, *citing Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 320 (1850), *overruled in part on other grounds by Commonwealth v. McLeod*, 326

N.E.2d 905 (Mass. 1975).[34] The Court then noted that the same Massachusetts court had

> said, that an instruction to the jury that they should be satisfied of the defendant's guilt beyond a reasonable doubt, had often been held sufficient, without further explanation.

Id., citing Commonwealth v. Costley, 118 Mass. 1 (1875). While opining that "[i]n many cases it *may* undoubtedly be sufficient," *id.* (emphasis added),[35] the *Hopt* Court stated:

> *But in many instances, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension. As a matter of fact, it has been the general practice in this country of courts holding criminal trials to give such explanation or illustration.* The

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[34] "The difficulty with this instruction is, that the words 'to a reasonable and moral certainty' add nothing to the words 'beyond a reasonable doubt'; one may require explanation as much as the other." *Id.*

[35] The Court followed this observation with the statement: "It is simple, and *as a rule* to guide the jury is as intelligible to them generally as any which could be stated, with respect to the conviction they should have of the defendant's guilt to justify a verdict against him." *Id.* (emphasis added). The Court clearly did *not* mean to imply that the mere statement of the reasonable doubt "rule" is just as "intelligible" as any explanation of that rule. Rather, the Court meant only that the reasonable doubt rule is just as intelligible as any other brief "rule-type" statement of the proper burden of proof. In the passage immediately following, quoted below in text, the Court emphasized that "some *explanation or illustration of the rule*" would often help the jury. *See id.* (emphasis added).

> rule may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them. *But an illustration like the one given in this case,* by reference to the conviction upon which the jurors would act in the weighty and important concerns of life, *would be likely to aid them to a right conclusion,* when an attempted definition might fail.

Id. at 440-41 (emphases added). In sum, the Court in *Hopt,* while conceding that certain poorly phrased "definitions" of reasonable doubt might tend to confuse rather than clarify, emphasized the value of providing an appropriate "explanation or illustration" of the concept to the jury.[36]

One other piece of 19th-century dictum is also frequently cited with regard to this issue. In *Miles v. United States,* 103 U.S. 304 (1881), decided six years before *Hopt,* the Court commented that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." *Id.* at 312. The thrust of this dicta was largely contradicted by the later decision in *Hopt,* as the foregoing discussion illustrates. The Court in *Miles* was addressing a claim (which it rejected) that the definition provided in that case

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[36] It is not clear whether this Court in *Victor* intended to follow the *Hopt* Court's distinction between a "definition" of reasonable doubt and an "explanation or illustration" of that concept. *Cf. supra* at 5, note 5 (noting the distinction between these terms).

was erroneous, and thus was not confronted with the issue of whether any explanation at all was required.[37]

Such century-old dicta cannot be given much weight in any event, in light of the subsequent sea changes in this Court's reasonable doubt jurisprudence reflected in *Winship*, *Jackson*, and *Sullivan*. It was not established, prior to *Winship*, that the reasonable doubt standard *itself* is constitutionally required, so it is only to be expected that this Court's prior decisions would be silent on whether an *explanation* of that concept is constitutionally required. And it was not at all clear, prior to *Sullivan*, how central the Sixth Amendment right to jury trial is to this issue. *See supra* at 7-9.

In any event, this Court's dictum in *Victor* cannot be viewed as dispositive on the facts of petitioner's case. Petitioner's entire defense was premised on the prosecution's failure to establish his guilt beyond a reasonable doubt. In that context, it is difficult to overstate the importance of fully and properly explaining this constitutional guarantee to the jury. Furthermore, the Fourth Circuit below held not merely that an explanation of reasonable doubt need not be provided "as a matter of course," but that a trial court should *never* provide an explanation. That is a far harsher rule than any suggested by the dictum in *Victor*. As set forth *supra* at 14, note 13, petitioner, while contending that an explanation of

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[37] This Court quoted the *Miles* dictum in *Holland v. United States*, 348 U.S. 121, 140 (1954), in the course of a passage devoted mainly to criticizing, as potentially confusing, the particular definition of reasonable doubt at issue there (which the Court ultimately upheld). Again, the issue of whether an explanation was required was not before the Court.

reasonable doubt is always required upon request, argues in the alternative that trial courts must, at the very least, enjoy the discretion to provide an explanation. Finally, the *Victor* dictum sheds no light on whether, as petitioner contends, defense counsel must be permitted to present argument to the jury on the meaning of reasonable doubt. *See supra* at 15-19.

In sum, this Court, having never squarely addressed the fundamental issues presented by this case, should now grant certiorari, resolve the conflict in the lower courts, and provide clear and definitive guidance on these vital constitutional questions.

CONCLUSION

For the foregoing reasons, petitioner urges this Court to issue a writ of certiorari in this case.

Respectfully submitted,

Stephen H. Sachs,
Counsel of Record
Mark D. Cahn
Bryan H. Wildenthal
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

June 8, 1994

[1. Unpublished opinion *per curiam* of the Court of Appeals, *United States v. Jones*, No. 92-5661 (4th Cir. April 13, 1994)]

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	No. 92-5661
LESTER V. JONES, *Defendant-Appellant.*	)	

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Herbert N. Maletz, Senior Judge, sitting by designation.
(CR-90-405-MJG)

Argued: December 10, 1993

Decided: April 13, 1994

Before ERVIN, Chief Judge, WILKINS, Circuit Judge, and
WILLIAMS, Senior United States District Judge for the Eastern
District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Stephen Howard Sachs, WILMER, CUTLER & PICKERING, Washington, D.C., for Appellant. Joseph Lee Evans, Assistant United States Attorney, Baltimore, Maryland, for Appellee. **ON BRIEF:** Mark D. Cahn, WILMER, CUTLER & PICKERING, Washington, D.C., for Appellant. Richard D. Bennett, United States Attorney, Ira L. Oring, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

On April 23, 1992 Lester Jones was convicted of two counts of income tax evasion in violation of 26 U.S.C. § 7201. The jury found him not guilty of two counts of fraudulent filing of amended returns in violation of 26 U.S.C. § 7206(1). On September 30, 1992 Jones was sentenced to eighteen months imprisonment, a $25,000 fine and a $50 special assessment. Jones appeals his conviction solely on the basis that the court erred in refusing to instruct the jury on the meaning of "reasonable doubt." Finding no error, we affirm.

I.

Lester Jones, a Maryland attorney engaged in private practice, was randomly selected for an IRS audit in the spring of 1986. Revenue agent Joan Rowe investigated Jones' tax returns and discovered that Jones had failed to report on his federal return approximately $120,000 in 1983 and $170,000 in 1984, resulting in a tax liability of approximately $135,000.

The existence and the amount of the understatement are not contested by Jones; he claims, however, that he did not intend to underreport his income. Jones maintains that he gave all relevant information to his tax preparer, Ronald Dochter, who had boasted that he could dramatically reduce Jones' tax obligations. Jones claims that the numerous double-countings and omissions on his returns were never brought to his attention by Dochter; Jones was preoccupied with the serious illness of his wife and with a

hectic, chaotic practice and therefore relied on his office staff and Dochter to prepare accurate returns.

Jones was indicted by a grand jury on October 18, 1990 and his trial began on July 1, 1991. The jury in that trial was unable to reach a verdict and a mistrial was declared on July 30, 1991. Retrial began on April 1, 1992.

Evidence at the retrial indicated that while Jones had reported an income of approximately $50,000 each year, he made expenditures for luxury items alone of $173,800 in 1983 and $237,000 in 1984. Jones also submitted several loan applications to banks during the period indicating his income to be between $150,000 and $200,000.

Jones did not testify at his retrial. His entire defense was that the government failed to carry the burden of proving his intent beyond a reasonable doubt. Jones' request that the court instruct the jury on the definition of reasonable doubt was denied.

The district court restricted defense counsel's ability to define reasonable doubt in his closing argument by permitting him to merely repeat in closing a baseball analogy to reasonable doubt that he had made in his opening argument. In his opening argument, defense counsel stated

> this business of reasonable doubt is not just a matter of whether the scales tip a little bit one way or the other. It is not in this business, in the criminal business, a tie

> doesn't go to the runner. They got to throw us out by a mile. That is what proof beyond a reasonable doubt means.

In closing, defense counsel reiterated his point by stating that "beyond a reasonable doubt means that it is it is [sic] close, if it is anywhere near close, the Government hasn't made its case. They have to throw us out by a mile, to use a baseball metaphor." Jones argues that he was deprived of a fair trial because the district court refused to charge the jury on the definition of reasonable doubt and limited his closing argument in that respect.

II.

The clear mandate of the Fourth Circuit is that district court judges should refrain from defining reasonable doubt. *United States v. Ricks*, 882 F.2d 885, 894 (4th Cir. 1989); *United States v. Valezquez*, 847 F.2d 140, 142-43 (4th Cir. 1988); *United States v. Porter*, 821 F.2d 968, 972-73 (4th Cir. 1988); *United States v. Headspeth*, 852 F.2d 753, 755 (4th Cir. 1988); *United States v. Crockett*, 813 F.2d 1310, 1317 (4th Cir. 1987); *United States v. Love*, 767 F.2d 1052, 1060 (4th Cir. 1985); *United States v. Moss*, 756 F.2d 329, 333 (4th Cir. 1985).

This court recently addressed the issue in *United States v. Reives*, 15 F.3d 42 (4th Cir. 1994). After indicating that "we have never found a refusal of a party's request for a clarifying instruction to be error . . . ," we further noted that where a definition was given, we have not reversed on that ground alone but rather have examined the instruction as a whole to see whether it was

prejudicially misleading or confusing. *Id.* at 44. In affirming the district court's refusal to give a clarifying instruction, "we reaffirm[ed] our longstanding, albeit forgiving, proscription against any attempts to define reasonable doubt to jurors." *Id.* at 46.

Furthermore, we have consistently held that a district court has the authority to limit closing argument to prohibit counsel from defining reasonable doubt. *Headspeth,* 852 F.2d at 756; *Crockett,* 813 F.2d at 1317. Therefore, the district court did not err in limiting the closing argument of Jones' counsel.

III.

Given the clear precedent of this circuit, we find that the district court did not err in rejecting Jones' request for an instruction clarifying reasonable doubt or in limiting closing argument. Jones' conviction is therefore affirmed.

AFFIRMED

[2. Unpublished order of the Court of Appeals, *United States v. Jones*, No. 92-5661 (4th Cir. June 7, 1993) (*en banc*)]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 7, 1993

No. 92-5661
CR-90-405-MJG

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LESTER V. JONES

Defendant - Appellant

ORDER

The appellant's suggestion of hearing in banc was submitted to the Court. A majority of judges having voted in a requested poll of the Court to deny hearing in banc,

IT IS ORDERED that the suggestion for hearing in banc is denied.

IT IS FURTHER ORDERED that this case shall be calendared for argument at the October 1993 session of Court.

Entered at the direction of Chief Judge Ervin with the concurrence of Judges Russell, Hall, Phillips, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig and Williams. Judges Widener and Murnaghan dissent.

FOR THE COURT - BY DIRECTION

/s/ Bert M. Montague
CLERK

[3. Unpublished judgment of conviction and sentence of the District Court, *United States v. Jones*, No. MJG-90-0405 (D. Md. Sept. 30, 1992)]

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
V.	Case Number: MJG-90-0405
LESTER V. JONES	Joseph L. Evans/ Ira L. Oring Attorney for United States
(Name and Address of Defendant)	Stephen H. Sachs, Esq. (RET) Attorney for Defendant

_____FILED_____ENTERED
__LODGED____RECEIVED

SEP 30 1992

[illegible]
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY____CRIMINAL____DEPUTY

THE DEFENDANT ENTERED A PLEA OF:

[☐ guilty ☐ nolo contendere] as to count(s)_____, and
☐ not guilty as to count(s)_____.

THERE WAS A: Jury

[☐ finding ☒ verdict] of guilty as to count(s) 1 & 2 of the Superseding Indictment.

THERE WAS A: Jury

[☐ finding ☒ verdict] of not guilty as to count(s) 3 & 4 of the Superseding Indictment.
☐ judgment of acquittal as to count(s)_____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Counts 1 and 2, Title 26 and 18, Sections 7201 and 2 - Tax Evasion; Aiding and Abetting.

Microfilmed
Date SEP 30 1992

IT IS THE JUDGMENT OF THIS COURT THAT:
the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment of a term of 18 months as to Count No. 1, and 18 months as to Count No. 2 to run concurrent to Count 1.
IT IS FURTHER ORDERED that the defendant self-surrender at

12:00 noon on January 4, 1993.
IT IS FURTHER ORDERED that the defendant pay a fine in the amount of $25,000.00 as to Count No. 1.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any changes in your place of residence;
(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant

and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $ 50.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 2 as follows:

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

☐ The Court orders commitment to the custody of the Attorney General and recommends:

September 25, 1992
Date of Imposition of Sentence

/s/ Herbert N. Maletz
Signature of Judicial Officer

HERBERT N. MALETZ, SENIOR, U.S. DISTRICT JUDGE
Name and Title of Judicial Officer

Sep. 29, 1992
Date

I hereby attest and certify on 9-30-92 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody.

JOSEPH A. HAAS
CLERK, U.S. DISTRICT COURT
DISTRICT OF MARYLAND

By /s/ [illegible] Deputy

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at
Date
_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____

United States Marshal
By_____

Deputy Marshal

[4. Unpublished opinion and order of the District Court, *United States v. Jones*, No. MJG-90-0405 (D. Md. Nov. 12, 1992)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
		Criminal No.
v.	:	MJG-90-0405
		(Judge Maletz)
LESTER V. JONES	:	

MEMORANDUM AND ORDER

On September 25, 1992, the defendant Lester V. Jones was sentenced by the court to 18 months imprisonment and a fine of $25,000, following his conviction by a federal jury of two counts of tax evasion. At the conclusion of the defendant's sentencing proceeding, the defendant moved to remain free on bond pending his appeal. The parties have submitted memoranda on the issue and the court is now prepared to rule. For reasons explained below, the defendant's motion will be denied.

Under 18 U.S.C. § 3143(b), a defendant may only remain at liberty pending appeal if the court determines that his or her appeal raises a substantial question of law likely to result in a reversal, an order for a new trial, a sentence that does not include incarceration, or a reduced sentence which is less than any time served plus the

expected duration of the appeal process. The Fourth Circuit has defined a "substantial question" as a "close question or one that could very well be decided the other way." United States v. Steinhorn, 927 F.2d 195, 196 (4th Cir. 1991).

The only appellate issue that the defendant claims to be "substantial" is the court's refusal to define the term reasonable doubt in its instructions to the jury and its "limitation upon defense counsel's discussion of reasonable doubt in closing argument" (Def. Mem. at 3).[1] This, however, is not a close question or one that could be decided the other way. The Fourth Circuit has "frequently admonished district courts not to attempt to define reasonable doubt in their instructions to the jury absent a specific request from the jury itself." United States v. Headspeth, 852 F.2d 753, 755 (4th Cir. 1988); see also United States v. Ricks, 882 F.2d 885, 894 (4th Cir. 1989), cert. denied, 493 U.S. 1047 (1990); United States v. Valezquez, 847 F.2d 140, 142-43 (4th Cir. 1988); United States v. Porter, 821 F.2d 968, 972 (4th cir. 1988), cert. denied, 485 U.S. 934 (1988); United States v. Love, 767 F.2d 1052, 1060 (4th Cir. 1985), cert. denied, 475 U.S. 1081 (1986).

In the face of the above authorities, the defendant argues that the issue he presents is a close one because other Federal Circuits have decided the question the other way. The inquiry under Steinhorn, however, is not

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[1] While the court did instruct defense counsel not to define reasonable doubt, counsel was permitted to analogize reasonable doubt to his baseball metaphor that a "tie goes to the defendant and that the prosecution's burden is to throw the defendant out by a mile."

whether the issue in question has "divided the judiciary" (Def. Mem. at 3), but whether it is a close question under the precedents of this Circuit. As the above-cited cases demonstrate, the defendant's asserted issue clearly is not a close question in this Circuit.

The defendant also seeks to remain free pending appeal on the ground that he would likely serve his entire sentence before his appeal is decided. In support of this argument, the defendant cites a case decided by the Honorable Joseph H. Young of this court, United States v. McManus, 651 F.Supp. 382 (D.Md.), aff'd, 826 F.2d 1061 (4th Cir. 1987). In McManus, the defendant's motion for release pending appeal was granted despite the court's finding that no substantial appellate question existed. The court held release to be nevertheless appropriate because "if detained pending appeal, defendant will likely serve the better portion of his two year term of incarceration before the case is resolved." McManus, 651 F.Supp. at 384.

In making the above argument, the defendant fails to understand the significance of the congressional amendment that was made to 18 U.S.C. § 3143 after the McManus decision. At the time of that decision, § 3143 only provided for release pending appeal if a defendant presented a substantial issue likely to result in reversal or an order for new trial. As set forth above, Congress has since revised the statute so as to also provide for release if the defendant presents a substantial issue likely to result either in a sentence that does not include incarceration or a reduced sentence which is less than any time served plus the anticipated length of the appellate process. Thus, under § 3143, it is now evident that a defendant may not

be released pending appeal on the mere ground that his sentence will have been served by the time his appeal is decided. A defendant must in addition present a substantial appellate issue likely to result in a reduction of his sentence, such that incarceration pending appeal will be plainly unjust. As discussed above, the defendant has failed to present such an issue.

For the foregoing reason, the defendant's motion is denied.

Dated: November 12, 1992.

/s/ Herbert N. Maletz
Herbert N. Maletz
Senior Judge

[5. Unpublished order of the District Court, *United States v. Jones*, No. MJG-90-0405 (D. Md. June 23, 1993)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
		Criminal No.
v.	:	MJG-90-0405
		(Judge Maletz)
LESTER V. JONES	:	

MEMORANDUM AND ORDER

On September 25, 1992, the defendant, Lester V. Jones, was sentenced by the court to 18 months imprisonment following his conviction on two counts of tax evasion. The defendant was also fined $25,000 and sentenced to perform 1,000 hours of community service upon his release from prison. Having served some six months of his sentence, the defendant now moves, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for an order of the court reducing the sentence of confinement to time served. The government opposes the motion.

Because of the failing health of the defendant's wife and daughter, the court will grant the defendant's motion, with the condition that the defendant be placed on probation for the remainder of his 18-month sentence. The defendant's daughter has been confined to bed rest since

the difficult and complicated birth of her first child on May 10, 1993. While the responsibility for caring for their daughter has fallen on the defendant's wife, she herself has been in declining health as a result of stress and an aggravated ulcer condition.

The court is also influenced by the defendant's exemplary work performance during his period of incarceration, as demonstrated by the report of his prison supervisor. Under these circumstances, and given the nature of the defendant's offense, the court does not believe that any appropriate purpose would be served by the defendant's continued incarceration. Accordingly, it is hereby ordered this 23rd day of June, 1993, by the United States District Court for the District of Maryland, the following:

1) The defendant's term of imprisonment is reduced to time served; he shall be released immediately;

2) The defendant shall be placed on probation for the time remaining to be served on his original 18-month sentence;

3) The defendant shall perform the 1,000 hours of community service previously ordered upon his release from prison; and

4) The defendant shall pay the $25,000 fine previously ordered, if he has not already done so.

/s/ Herbert N. Maletz
Herbert N. Maletz
Senior Judge

[6. Original Indictment, *United States v. Jones*, No. MJG-90-0405 (Oct. 18, 1990)]

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	CRIMINAL NO. G-90-0405
v.	:	(Tax Evasion, 26 U.S.C.
LESTER V. JONES	:	§7201; Aiding and Abetting 18 U.S.C. §2)

INDICTMENT

The Grand Jury for the District of Maryland charges:

That on or about the 14th day of August, 1984, in the State and District of Maryland,

LESTER V. JONES

a resident of Hydes, Maryland, who during the calendar year 1983 was married, did willfully attempt to evade and defeat a large part of the income tax due and owing by him and his spouse to the United States of America for the calendar year 1983, by preparing and causing to be prepared, and by signing and causing to be signed, and by mailing and causing to be mailed in the District of

Maryland a false and fraudulent joint U. S. Individual Income Tax Return, Form 1040, on behalf of himself and his spouse, which was filed with the Internal Revenue Service, wherein it was stated that their joint taxable income for said calendar year was the sum of $51,317.75, and that the amount of tax due and owing thereon was the sum of $15,879.00, whereas, as he then and there well knew and believed, their joint taxable income for the said calendar year was approximately $150,000, upon which said joint taxable income there was a substantial tax due and owing to the United States of America, to wit, approximately $59,000.00.

26 U.S.C. §7201
18 U.S.C. §2

COUNT II

The Grand Jury for the District of Maryland charges:

That on or about the 12th day of August, 1985, in the State and District of Maryland,

LESTER V. JONES

a resident of Hydes, Maryland, who during the calendar year 1984 was married, did willfully attempt to evade and defeat a large part of the income tax due and owing by him and his spouse to the United States of America for the calendar year 1984, by preparing and causing to be prepared, and by signing and causing to be signed, and by mailing and causing to be mailed in the District of

Maryland a false and fraudulent joint U. S. Individual Income Tax Return, Form 1040, on behalf of himself and his spouse, which was filed with the Internal Revenue Service, wherein it was stated that their joint taxable income for said calendar year was the sum of $50,792.27, and that the amount of tax due and owing thereon was the sum of $15,940.46, whereas, as he then and there well knew and believed, their joint taxable income for the said calendar year was approximately $183,000, upon which said joint taxable income there was a substantial tax due and owing to the United States of America, to wit, approximately $76,000.00.

26 U.S.C. §7201
18 U.S.C. §2

/s/ Breckinridge L. Willcox
Breckinridge L. Willcox
United States Attorney

A TRUE BILL:

/s/ [illegible]
Foreperson

[7. Superseding Indictment, *United States v. Jones*, No. MJG-90-0405 (March 21, 1991)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	CRIMINAL NO.
		MJG-90-0405
v.	:	(Tax Evasion, 26 U.S.C.
LESTER V. JONES	:	§7201; False Declaration, 26 U.S.C. §7206(1);
Aiding		and Abetting, 18 U.S.C. §2)

SUPERSEDING INDICTMENT

The Grand Jury for the District of Maryland charges:

That on or about the 14th day of August, 1984, in the State and District of Maryland,

LESTER V. JONES

a resident of Hydes, Maryland, who during the calendar year 1983 was married, did willfully attempt to evade and defeat a large part of the income tax due and owing by him and his spouse to the United States of America for the calendar year 1983, by preparing and causing to be prepared, and by signing and causing to be signed, and by mailing and causing to be mailed in the District of Maryland a false and fraudulent joint U. S. Individual Income Tax Return, Form 1040, on behalf of himself and his spouse, which was filed with the Internal Revenue Service, wherein it was stated that their joint taxable income for said calendar year was the sum of $51,317.75, and that the amount of tax due and owing thereon was the sum of $15,879.00, whereas, as he then and there well knew and believed, their joint taxable income for the said calendar year was approximately $170,000, upon which said joint taxable income there was a substantial tax due and owing to the United States of America, to wit, approximately $68,000.00.

26 U.S.C. §7201
18 U.S.C. §2

COUNT II

And the Grand Jury for the District of Maryland charges:

That on or about the 12th day of August, 1985, in the State and District of Maryland,

LESTER V. JONES

a resident of Hydes, Maryland, who during the calendar year 1984 was married, did willfully attempt to evade and defeat a large part of the income tax due and owing by him and his spouse to the United States of America for the calendar year 1984, by preparing and causing to be prepared, and by signing and causing to be signed, and by mailing and causing to be mailed in the District of Maryland a false and fraudulent joint U. S. Individual Income Tax Return, Form 1040, on behalf of himself and his spouse, which was filed with the Internal Revenue Service, wherein it was stated that their joint taxable income for said calendar year was the sum of $50,792.27, and that the amount of tax due and owing thereon was the sum of $15,940.46, whereas, as he then and there well knew and believed, their joint taxable income for the said calendar year was approximately $217,000, upon which said joint taxable income there was a substantial tax due and owing to the United States of America, to wit, approximately $93,000.00.

26 U.S.C. §7201
18 U.S.C. §2

COUNT III

And the Grand Jury for the District of Maryland charges:

That on or about the 6th day of October, 1986, in the State and District of Maryland,

LESTER V. JONES

a resident of Hydes, Maryland, did willfully and knowingly make and subscribe an amended joint United States Individual Income Tax Return, Form 1040, for the calendar year 1983, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service Center at Philadelphia, Pennsylvania, the said LESTER V. JONES well knowing that the 1983 Amended United States Individual Income Tax return was not true and correct as to every material matter in that the said LESTER V. JONES reported on Line 1a of Schedule C that the gross receipts for 1983 generated from his business and profession as an attorney were $297,002.35, whereas the said LESTER V. JONES there knew and believed that he had received additional gross receipts which should have been included in the figure on Line 1a of Schedule C of the 1983 amended joint United States Individual Income Tax return.

26 U.S.C. §7206(1)
18 U.S.C. §2

COUNT IV

And the Grand Jury for the District of Maryland charges:

That on or about the 6th day of October, 1986, in the State and District of Maryland,

LESTER V. JONES

a resident of Hydes, Maryland, did willfully and knowingly make and subscribe an amended joint United States Individual Income Tax Return, Form 1040, for the calendar year 1984, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service Center at Philadelphia, Pennsylvania, the said LESTER V. JONES well knowing that the 1984 Amended United States Individual Income Tax return was not true and correct as to every material matter in that the said LESTER V. JONES reported on Line 1a of Schedule C that his gross receipts for 1984 generated from his business and profession as an attorney were $422,907.27, whereas the said LESTER V. JONES there knew and believed that he had received additional gross receipts which should have been included in the figure on Line 1a of Schedule C of the 1984 amended joint United States Individual Income Tax Return.

26 U.S.C. §7206(1)
18 U.S.C. §2

/s/ Breckinridge L. Willcox
Breckinridge L. Willcox
United States Attorney

A TRUE BILL:

_____
Foreperson

3/21/91
Dated

[8. Excerpt of charging conference at first trial before Judge Garbis (July 15, 1991) (Tr. at 973)]

THE COURT: . . . . Mr. Sachs. You don't have to argue it now. I want you to know this is a dilemma that I would like to see straightened out, especially in a case like this.

MR. SACHS: We are grateful for the Court addressing it in advance. I can tell you that we of course -- as the Court may have seen, we request notwithstanding the Fourth Circuit's ruling, we request an instruction, the classic one about the most important affairs, et cetera. We recognize the Court is bound, it cannot give it. The Supreme Court however has never addressed it.

We believe that --

THE COURT: I will go further, Mr. Sachs. I think that you are right. I think that -- I am not suggesting that this case should ever get up to appeal. But if it did, I would hope that that would be reversible error not to give it.

MR. SACHS: In any case, Your Honor, we take that view and recognize your hands are tied. We nonetheless request it.

[9. Excerpt of petitioner's counsel's closing argument at first trial before Judge Garbis (July 22, 1991) (Tr. at 1296)]

MR. SACHS: . . . . Beyond a reasonable doubt, ladies and gentlemen, doesn't mean beyond any doubt. It doesn't mean that the government has to prove its case to a mathematical certainty. Very few things can be done that precise.

But it does mean that they have to remove any doubt that's reasonable, any concern of the kind that would cause you to hesitate in the most important of your own personal or family or business or job situations.

[10. Excerpt of petitioner's counsel's opening statement at second trial before Judge Maletz (April 2, 1992) (Tr. at 45-46)]

MR. SACHS: . . . . I mention this presumption of Les Jones' innocence and the need for the Government to prove the case beyond a reasonable doubt, as Judge Maletz reminded you yesterday, this presumption of innocence is Les Jones' and it remains with him throughout the entire case, until the Government has removed it, and this business of reasonable doubt is not just a matter of whether the scales tip a little bit one way or the other. It is not in this business, in the criminal business, a tie doesn't go to the runner. They got to throw us out by a mile. That is what proof beyond a reasonable doubt means.

[11. Petitioner's requested jury instruction on reasonable doubt at second trial before Judge Maletz (April 9, 1992)]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA Plaintiff,	)	
v.	)	CRIMINAL NO. MJG-90-0405
LESTER V. JONES Defendant	)	

DEFENDANT'S REQUESTED INSTRUCTIONS TO THE JURY

Defendant Lester V. Jones hereby requests the Court instruct the jury in the above-captioned case in accordance with the proposed instructions attached hereto.

Respectfully submitted,

/s/ Stephen H. Sachs
Stephen H. Sachs
WILMER, CUTLER & PICKERING
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Dated: April 9, 1992

[. . . .]

DEFENDANT'S REQUESTED INSTRUCTION NO. 2

Reasonable Doubt[1]

I have said that the government must prove the defendant guilty beyond a reasonable doubt. The question naturally is what is a reasonable doubt? The words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt which would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. A reasonable doubt is not a caprice or whim; it is not a speculation or suspicion. It is not an

[1] The defendant recognizes that this instruction is foreclosed by Fourth Circuit law, United States v. Ricks, 882 F.2d 885, 894 (4th Cir. 1989), but notes that the fairness of the Fourth Circuit's restriction on this instruction has not been ruled upon by the United States Supreme Court.

excuse to avoid the performance of an unpleasant duty. And it is not sympathy.

In a criminal case, the burden is at all times upon the government to prove guilt beyond a reasonable doubt. The law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to the defendant, which means that it is always the government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt.

If, after fair and impartial consideration of all of the evidence you have a reasonable doubt, it is your duty to acquit the defendant. On the other hand, if after fair and impartial consideration of all the evidence you are satisfied of the defendant's guilt beyond a reasonable doubt, you should vote to convict.

Modern Federal Jury Instructions § 4-2

[12. Excerpt of charging conference at second trial before Judge Maletz (April 16, 1992) (Tr. at 1399-1405)]

MR. SACHS: Your Honor, I can't identify it on the first ten pages, except I think it is probably appropriate to raise it here. We specifically request that the Court give the reasonable doubt instruction requested by us as instruction number two, but as we point out in our footnote, we recognize the fact that the Fourth Circuit has forbidden you to do that.

THE COURT: You mean define reasonable doubt?

MR. SACHS: Yes, sir. We have asked for that. We know you don't have the authority to do it, I understand that.

THE COURT: Right.

MR. SACHS: But some day, I know it is not in this case, but some day, a higher court than the Fourth Circuit may have to look at that, and so I simply want to preserve the point that we requested, but we recognize you can't give it. It is our requested instruction number two. Our reasonable doubt request.

THE COURT: Incidentally, I am well aware of the fact, in closing argument you may not, according to the teaching of the Fourth Circuit, define reasonable doubt of the defendant for the jury. I know that is a problem.

MR. SACHS: Your Honor, in the last trial, I think the parties agreed, although I am not positive of this. I know I said without objection that -- I used I believe the boilerplate language, that, you know, this means doubt about the most important affairs --

THE COURT: In your life and so on.

MR. EVANS: I don't think you said that, Steve.

MR. SACHS: I also said there was a colloquialism, I said they have to throw us out by a mile. The tie doesn't go to the runner. Judge Garbis permitted that, I believe, I know I did, and the Government I think did not object to it.

THE COURT: Object to what?

MR. SACHS: Well, the Government I believe, the Government will have to speak for itself. I know I said that reasonable doubt means that it can't be a close call. A tie as in baseball, a tie doesn't go to the runner, they have to throw us out by a mile. I recognize it is not the perfect metaphor, but the Government did not object to that.

Judge Garbis expressly, in a conference like this, permitted me to do it, I thought I also said, but I could be wrong, the usual boilerplate. But in any case, Your Honor, I request that I be permitted, even though I know the Court can't give the instruction, that I be permitted to give what in most courts in this country is given weight, Judge, is s [sic] definition of reasonable doubt.

THE COURT: Of course, except the Fourth Circuit.

MR. SACHS: Except the Fourth Circuit, but I repeat most courts in this country who have a sounder view of this matter than the eccentric Fourth Circuit.

THE COURT: I am not so sure it is an eccentric Fourth Circuit. The First Circuit has taken the position that the term reasonable doubt defines itself and it is not necessary to elaborate on that. There is a decision on that.

Now, what the District Courts now do, I don't know, but I do know what the First Circuit has said, but we are in the Fourth Circuit in any event.

Mr. Evans, what is your position?

MR. EVANS: Well, we feel obliged to follow what the Fourth Circuit says. I don't think that we can sort of concur, or I certainly would object to Mr. Sachs arguing from the old boilerplate definitions that used to be given, you know, most important decisions in your life, you know, I certainly object to that.

If he is going to say -- if Steve is going to say, a tie doesn't go to the runner, something like that, I mean, we are not going to stand up and object in the middle of this closing argument.

THE COURT: Let's see if we can get this matter squared away right now. First, there is not even a request of the Court by Mr. Sachs to argue that he be allowed to

argue before the jury as to what the old, shall we say hackneyed meaning of reasonable doubt is.

MR. SACHS: I am making that request.

THE COURT: You mean about the most important thing in your life?

MR. SACHS: I want to tell the jury that.

THE COURT: You want to argue that?

MR. SACHS: I am asking the Court's permission. If the Court forbids it obviously, I won't do it. I don't think there is anything in the four or five or six cases in the Fourth Circuit on the subject of the Court, I don't think there is anything that forbids a defendant from arguing that to the jury. I think you are free to permit me to do it, and I ask that you --

THE COURT: I really don't think so. In any event, I will sustain that objection, and I will not permit argument based on a definition of reasonable doubt, because this Court, the Fourth Circuit, when I say this Court has stated again and again, we do not want reasonable doubt defined, and I believe, I am not positive of this, that one or two decisions by the Fourth Circuit to the effect that where the defendant's counsel wanted to argue precisely the point that you want to argue, Mr. Sachs, the Fourth, this Court would not permit it, and the Fourth Circuit said the Court acted well within its discretion. In other words, I feel constrained.

MR. SACHS: I certainly accept the Court's ruling and disagree with it, and would like my exception noted. That moves us to the colloquialism I was permitted to do the last time, which is the baseball metaphor, which I feel --

THE COURT: What is your position on that?

MR. EVANS: Well, I don't really like it, because it is simply another way of defining reasonable doubt, and so it is kind of doing through the back door what can't be done through the front door. If that is the metaphor that Mr. Sachs is going to use -- I mean, we don't like to object during closing argument.

THE COURT: We are not talking about objecting at the course of the closing argument. We are talking about now.

MR. EVANS: All right. Well, I think we have to oppose it, Your Honor. I think the law constrains us to oppose it for the same reasons we opposed the other.

MR. SACHS: May I remind the Court, I had said precisely that in my opening statement without objection, in this case without objection.

THE COURT: I am going to put it this way. If you said it in the opening statement without objection, you can use precisely the same words for your closing. I think otherwise we would have an incongruous result, I think, and I want the objection to be noted to that extent.

In other words, your position, I can understand it, getting around the Court's ruling from the back door. Not quite.

MR. EVANS: Not quite, but sort of.

THE COURT: Open the door a little bit.

MR. SACHS: Your Honor, I just want to point out in this connection, a year ago I tried a criminal case before Judge Nickerson, and the issue arose as to whether the Court had -- what the Court should or would and should do if the jury asked for a definition. And that led to the next issue of whether counsel can tell the jury that it has the right to ask for a definition.

Let me quickly say, I have no intention -- I will not do such a thing, but the variance on the issue --

THE COURT: Suppose the jury should ask, we will cross that bridge when we get to it.

MR. SACHS: I understand, and I will certainly not encourage them to ask.

THE COURT: I don't know how Judge Nickerson would feel today, it kind of escapes me now, about seven defendants.

MR. SACHS: A drug case.

MR. EVANS: A drug case.

THE COURT: As I said, I was directing you gentlemen to my first ten pages, which in my view constitute the boilerplate.

Is there anything further?

MR. SACHS: Not on the first ten pages, Your Honor.

THE COURT: I think you have indicated you have no objection.

MR. EVANS: That is correct.

[13. Excerpt of petitioner's counsel's closing argument at second trial before Judge Maletz (April 20, 1992) (Tr. at 1516-17)]

MR. SACHS: . . . . Ladies and gentlemen, in the deadly serious business of a criminal case, especially a criminal tax case, there needs to be something more than numbers, even big numbers. There has to be an intent to cheat. And you can't brand a man a felon, you can't put the mark of Cain on his brow, based on guessing or speculation or conjecture. And beyond a reasonable doubt means that it is it is [sic] close, if it is anywhere near close, the Government hasn't made its case. They have to throw us out by a mile, to use a baseball metaphor.

[14. Excerpt of proceedings at second trial before Judge Maletz (jury verdict) (April 22, 1992) (Tr. at 1618-22)]

THE CLERK: We are taking a verdict in criminal number MJG 90-0405, USA versus less [sic] Lester V. Jones.

Members of the jury, please answer to your names as I call them.

(Roll call.)

THE CLERK: Members of the jury have you agreed upon your verdict?

THE JURY: Yes.

THE CLERK: Who shall say for you?

THE FOREMAN: I shall.

THE COURT: Would you please stand, sir.

THE CLERK: Has verdict sheet which was submitted to the jury been answered?

THE FOREMAN: Yes, it has.

THE CLERK: Is the form signed and dated by you?

THE FOREMAN: Yes, it has been.

THE CLERK: Would you answer the questions as I read them.

Verdict form, count one, question one, how do you find the defendant, Lester V. Jones, as to count one of the superseding indictment?

THE FOREMAN: Guilty.

THE CLERK: Count two, question two, how do you find the defendant, Lester V. Jones, as to count two of the superseding indictment?

THE FOREMAN: Guilty.

THE CLERK: Count three, question three, how do you find the defendant, Lester V. Jones, as to count three of the superseding indictment?

THE FOREMAN: Not guilty.

THE CLERK: Count four, question four, how to [sic] you find the defendant, Lester V. Jones, as to count four of the superseding indictment?

THE FOREMAN: Not guilty.

THE COURT: Please poll the jury.

THE CLERK: Mr. Foreman, you have announced the verdict of the jury, is that your verdict also?

JUROR NUMBER 1: Yes, it is.

THE CLERK: Juror number 2, you have heard the verdict as yours?

JUROR NUMBER 2: Yes, it is.

THE CLERK: Juror number 3, you have heard the verdict as yours?

JUROR NUMBER 3: Yes, it is.

THE CLERK: Juror number 4, you have heard the verdict as yours?

JUROR NUMBER 4: Yes.

THE CLERK: Juror number 5, you have heard the verdict as yours?

JUROR NUMBER 5: Yes. It is.

THE CLERK: Juror number 6, you have heard the verdict as yours?

JUROR NUMBER 6: Yes, it is.

THE CLERK: Juror number 7, you have heard the verdict announced by your Foreman as to the defendant and as to each of the counts in which he is charged, is that your verdict?

JUROR NUMBER 7: Yes, it is.

THE CLERK: Number 8, you have heard the verdict as yours?

JUROR NUMBER 8: Yes, it is.

THE CLERK: Number 9, you have heard the verdict as yours?

JUROR NUMBER 9: Yes.

THE CLERK: Juror number 10, you have heard the verdict as yours?

JUROR NUMBER 10: Yes.

THE CLERK: Juror number 11, you have heard the verdict as yours?

JUROR NUMBER 11: Yes.

THE CLERK: Juror number 12, you have heard the verdict as yours, is that your verdict?

JUROR NUMBER 12: Yes, it is.

THE CLERK: Members of the jury, harken to your verdict as the Court has recorded it. The verdict and answers thereto having been read, you and each of you have answered them as read by your foreman and so you all say?

THE JURY: Yes.

THE CLERK: Verdict recorded.

THE COURT: Ladies and gentlemen of the jury, I know that you have given this case your most earnest

attention during the course of trial and during the course of your deliberations. It has been a privilege to have worked with you. I know that you have given consideration to all the contentions of the parties, the most earnest consideration to all the parties.

At this juncture, I want to excuse you with the thanks of the Court. The jury will now be excused.

(The jury is excused from the courtroom.)

[15. Excerpts from manuscript of Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. ___ (1994) (forthcoming) (manuscript at 1-4, 8, 19-20)]

Beyond "Reasonable Doubt"

by Jon O. Newman*

It is a great honor for me to participate in the James Madison Lecture series. This series has a special significance for me that I believe is shared by only two of the distinguished men and women who have preceded me to this podium. This series was endowed by Louis Schweitzer, and it was my distinct privilege to know that remarkable individual. We met in 1970 when I was asked by the Ford Foundation to prepare an evaluation of the Vera Institute of Criminal Justice, the pioneering research and action agency that Mr. Schweitzer initially funded (and named in memory of his wife). The interview left me with a vivid impression of his commitment to an enlightened system of criminal justice. So it is a special privilege for me to participate in the lecture series that he initially made possible.

The James Madison Lectures were inaugurated "to enhance the appreciation of civil liberty and strengthen the

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* Judge Newman is the Chief Judge of the United States Court of Appeals for the Second Circuit. This lecture was delivered as the James Madison Lecture at New York University Law School on November 9, 1993.

national purpose." Any lecture named for the principal architect of the Bill of Rights could aspire to no lesser goal. I hope I do not stray outside the lofty objective of this distinguished series by focusing on a right that is not mentioned in Madison's handiwork, and was not given formal recognition as comprehended within the general language of the Bill of Rights until 1970,[1] though assumed by the Supreme Court to be a requirement, at least in the federal courts, as early as 1881.[2] My focus is the implicit component of the Due Process Clause that guarantees every person the right not to be convicted of a crime unless the evidence establishes guilt beyond a reasonable doubt.

My thesis may be stated quite simply. I believe that the constitutional jurisprudence of this Nation has accepted the "reasonable doubt" standard as a verbal formulation to be conveyed to juries in jury charges, but has failed to take the standard seriously as a rule of law against which the validity of convictions is to be judged. The consequences of this deficiency are, in my view, two-fold: We are convicting some people who are not guilty beyond a reasonable doubt, a few of whom may in fact be innocent, and at the same time, quite paradoxically, we are acquitting some people who could be proven to be guilty beyond a reasonable doubt, most of whom are in fact

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[1] See In re Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

[2] See Mills v. United States, 103 U.S. 304, 312 (1881) ("The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt.").

guilty. Thus the proposition I wish to discuss is that the time has come for American courts, especially federal courts, to move beyond "reasonable doubt" as merely an incantation, to give renewed consideration to what the standard means and how it should be applied as a rule of law, toward the end that the standard serves as a more precise divider of the guilty from the innocent.

I say "more precise" because all must recognize that fact-finders are fallible and that any system of adjudicating guilt will inevitably run some risk of both convicting the innocent and acquitting the guilty. Recognition of the inevitability of both types of mistakes usually leads us to say that it is better to acquit some number of guilty persons than to convict one innocent person.[3] What we would not readily agree on is the appropriate ratio of guilty persons acquitted to innocent persons convicted. The cases have frequently mentioned a ratio of ten to one,[4] though ratios of twenty to one, and even ninety-nine to one have been mentioned in earlier literature.[5]

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[3] "[I]t is far worse to convict an innocent man than to let a guilty man go free." In re Winship, 397 U.S. 358, 372 (Harlan, J., concurring).

[4] See Furman v. Georgia, 408 U.S. 238, 367 n. 158 (Marshall, J., concurring (quoting William O. Douglas, Foreword in Jerome Frank and Barbara Frank, Not Guilty 11-12 (1957)); Goetz v. Crosson, 967 F.2d 29, 39 (2d Cir. 1992) (Newman, J., concurring); Bunnell v. Sullivan, 947 F.2d 341, 351 (9th Cir. 1991) (in banc) (Kozinski, J., concurring); United States v. Greer, 538 F.2d 437, 441 (D.C. Cir. 1976); 4 William Blackstone, Commentaries ch. 27, p. 358.

[5] See Sir John Fortescue, De Laudibus Legum Angliae, ch. 27, p. 65 (originally written 1471, republished in Dr. Chrimes ed., Cambridge Univ. Press 1949) ("I should, indeed, prefer for twenty

Whatever ratio we find acceptable, one of the major variables in achieving that ratio is the degree of certainty we impose on fact-finders. If you would tolerate as many as 100 guilty persons going free in preference to convicting one innocent person, then you will insist that no one be convicted unless the fact-finder is sure of guilt to a degree approaching absolute certainty. If your ratio is ten to one, then you will likely impose a somewhat less rigorous standard upon the fact-finder, but still require a high degree of certainty.

[manuscript at 1-4]

[. . . .]

A somewhat curious aspect of the "reasonable doubt" standard is the reluctance of most courts to offer the jury any explanation as to what the standard means. Indeed, some federal courts have in recent years sternly admonished trial judges not to attempt any amplification of the standard whatsoever.[18] I find it rather unsettling that

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guilty men to escape death through mercy, than one innocent to be condemned unjustly."); Thomas Starkie, Evidence 756 (1724), quoted in IX Wigmore on Evidence § 2497 at 409-10 (Chadbourn rev. 1991) ("The maxim of the law is that it is better that ninety-nine . . . offenders shall escape than that one innocent man be condemned.").

[18] See, e.g., United States v. Hall, 854 F.2d 1036 (7th Cir. 1988); Murphy v. Holland, 776 F.2d 470, 478-79 (4th Cir. 1985), judgment vacated on other grounds, 475 U.S. 1138 (1986). See generally Note, Defining Reasonable Doubt: To Define, or Not to Define, 90 Colum. L. Rev. 1716, 1718-21 (1990).

we are using a formulation that we believe will become less clear the more we explain it.[19]

[manuscript at 8]

[. . . .]

II. Moving Beyond "Reasonable Doubt"

My argument is that the time has come for American courts to move beyond "reasonable doubt," to take this standard seriously and apply it conscientiously as a rule of law. By "moving beyond 'reasonable doubt'" I do not mean discarding the "reasonable doubt" standard in favor of some higher degree of certainty. I am entirely content to stay with "reasonable doubt" as the standard to which the jury must be persuaded of guilt. Nor do I mean to challenge the doctrine that, on appeal from convictions, appellate courts should view the evidence "in the light most favorable to the prosecution."[50] Rather, my point is that courts must do more than verbalize the "reasonable doubt"

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[19] See 1 Sand, supra [Leonard B. Sand et al., Modern Federal Jury Instructions (1993)], ¶ 4.01, at 4-12 ("[T]he better practice is to spend some moments with the jury discussing the government's standard of proof in order to clarify its meaning . . . ."). See also Defining Reasonable Doubt, supra, n.16 [sic].

[50] See Jackson v. Virginia, 443 U.S. [307] at 319 [1979]. But see Gregory, supra n.28 [Robert J. Gregory, Whose Reasonable Doubt? Reconsidering the Appropriate Role of the Reviewing Court in the Criminal Decision Making Process, 24 Amer. Crim. L. Rev. 910 (1987)] at 980 (arguing that reasonable doubt standard cannot properly be infused into sufficiency review as long as all reasonable inferences are construed in favor of the prosecution).

standard in jury instructions; they must make that standard an enforceable rule of law. There are several ways that courts could move beyond the current approach to reasonable doubt.

1. Clarifying the "reasonable doubt" jury instruction. First, we could make the "reasonable doubt" instruction clearer to jurors by focusing their attention solely on the need to be sure of guilt to a high degree. A model charge, prepared in 1987 by a subcommittee of the Judicial Conference's Committee on the Operation of the Jury System, contains very useful language. Its key sentence reads, "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt."[51] Notably absent from the subcommittee's model charge is the misleading phrase about a doubt "based on reason" and the ambiguous language about "hesitating on important matters."[52] For reasons not clear to me, this

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[51] See Federal Judicial Center, Modern Federal Jury Instructions Instruction 21 (1987).

[52] The complete instruction reads:

> As I have said many times, the government has the burden of proving a defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly

authoritatively formulated model instruction has not been widely adopted.

[manuscript at 19-20]

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convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

(2)

Supreme Court, U.S.
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No. 93-1961

In the Supreme Court of the United States

OCTOBER TERM, 1994

LESTER V. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Constitution entitles a defendant in a criminal case to jury instructions defining the term "reasonable doubt."

2. Whether the Constitution entitles a defendant in a criminal case to present argument to the jury concerning the meaning of the term "reasonable doubt."

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished, but the judgment is noted at 21 F.3d 426 (Table).

JURISDICTION

The opinion of the court of appeals was issued on April 13, 1994. The petition for a writ of certiorari was filed on June 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, an attorney, was charged with two counts of willfully attempting to evade income tax, in violation of 26 U.S.C. 7201, and two counts of willfully filing fraudulent amended tax returns, in violation of 26 U.S.C. 7206(1). Petitioner's first trial ended in a mistrial when the jury was unable to reach a verdict. At a second trial petitioner was convicted on the tax evasion counts and acquitted on the fraudulent return counts. Petitioner was sentenced to 18 months' imprisonment and a fine.[1] The court of appeals affirmed. Pet. App. 1a-6a.

1. Between 1982 and 1984, petitioner operated a successful law practice in Bel Air, Maryland. Gov't C.A. Br. 4; C.A. App. 40-41. Petitioner reported taxable income of $51,000 for 1983 and $50,000 for 1984, although his true taxable income for those years was $164,000 and $230,000. Gov't C.A. Br. 9. Petitioner consistently and accurately informed various financial institutions from which he was requesting loans that his net annual income ranged between $150,000 and $200,000. During the same time period, petitioner spent more than $410,000 on purchases of a variety of items including automobiles and condominiums. *Id.* at 9-10.

In the spring of 1986, the Internal Revenue Service audited petitioner's 1984 tax return. Although petitioner informed the IRS auditor that he had deposited all of his 1983-1984 gross receipts from his law practice into a single business account, that account actually contained only a portion of petitioner's fees. Petitioner had also

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[1] Citing the poor health of petitioner's wife and daughter, the district court later reduced the sentence. As a result of the court's action, petitioner served only six months' imprisonment. Pet. App. 19a-20a.

deposited hundreds of thousands of dollars into various personal accounts and had failed to report that income on his tax returns. In addition, petitioner had not reported all of the income deposited into the business account. Gov't C.A. Br. 4-5, 8.[2] After the IRS corrected his gross receipts and taxable income, petitioner owed approximately $135,000 in additional tax for 1983-1984. *Id.* at 8-9.

In the fall of 1986, after the IRS's civil auditor had referred petitioner's case to the IRS Criminal Investigation Division, petitioner filed amended 1983-1984 tax returns. On those amended returns, petitioner did not report as gross receipts the full amount of his cash fees or the proceeds of certain fee checks that he had cashed but not deposited. Gov't C.A. Br. 5-6.

2. In March 1991, a federal grand jury returned an indictment charging petitioner with attempted tax evasion for 1983-1984 and with willfully filing false 1983-1984 amended returns.[3] Gov't C.A. Br. 2; see 26 U.S.C. 7201, 7206(1). Petitioner's July 1991 trial ended in a mistrial when the jury was unable to reach a verdict. *Id.* at 3.

During his retrial, which occurred during a three-week period in April 1992, petitioner did not dispute the existence or the amount of his understated income, nor did he testify or call any witnesses on his own behalf. His defense, which he presented in both his opening statement and his closing argument, was that the

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[2] Petitioner reported gross receipts of $171,200 for 1983 and $184,500 for 1984. His correct gross receipts for those years were, respectively, $332,000 and $448,000. Gov't C.A. Br. 8.

[3] Although the government offered substantial evidence regarding petitioner's 1982 tax year in order to establish a pattern of unreported income, the statute of limitations barred any charges relating to that year. Gov't C.A. Br. 2 n.1.

government had failed to prove his guilt beyond a reasonable doubt. Pet. 2-3; C.A. App. 34-37, 213-217.

During the court's charge conference, petitioner requested that the district court define the term "reasonable doubt" in its jury instructions. The court refused to give petitioner's requested instruction, which defined "reasonable doubt" largely in terms of a hesitancy to act in important matters. The court explained that giving the instruction was prohibited by existing circuit precedent. In instructing the jury, however, the court repeatedly stated that petitioner was presumed innocent and that the government bore the burden of proving his guilt beyond a reasonable doubt. See C.A. App. 24, 203-210, 224-227, 234, 237-240, 245, 247.

In addition to requesting a jury instruction defining reasonable doubt, petitioner requested that the district court allow him to define the term in his closing argument to the jury. The court stated that petitioner could present a portion of his proposed definition, to the effect that "reasonable doubt" did not require the government to prove "its case to a mathematical certainty," but refused to allow him to argue the remainder, which stated that "reasonable doubt" was "any concern of the kind that would cause you to hesitate in the most important of your own personal or family or business or job situations." C.A. App. 211. Petitioner rejected the option offered by the court. *Id.* at 212. The court also allowed petitioner in his closing argument to explain "reasonable doubt" in "precisely the same words" as he had used in his opening statement. *Id.* at 208. Petitioner presented an extensive closing argument, in which he repeatedly stressed the presumption of innocence and the government's burden of proving his guilt beyond a reasonable doubt. *Id.* at 213-217. He also repeated the gist of a metaphor that he had used during

his opening statement, to the effect that "a reasonable doubt means that * * * if it is anywhere near close, the Government hasn't made its case. They have to throw us out by a mile, to use a baseball metaphor." Pet. App. 4a-5a, 42a.

The jury convicted petitioner of the two evasion counts and acquitted him of the two false filing counts. The court sentenced petitioner to 18 months' imprisonment and required him to pay a $25,000 fine. Pet. App. 10a-12a.

3. Petitioner appealed, contending that the district court had erroneously refused to define reasonable doubt in its jury instructions and had improperly refused to allow him to argue the meaning of the term in his closing argument. Pet. C.A. Br. 7-8. Acknowledging that the court of appeals had previously "ruled against the position advanced in [his] appeal," petitioner included a suggestion for en banc review in his appellate brief. *Id.* at 8-9.

After the court of appeals denied en banc review, see Pet. App. 7a-8a, a panel affirmed petitioner's conviction in an unpublished per curiam opinion. *Id.* at 1a-6a. Stating that it had "never found a refusal of a party's request for a clarifying instruction to be error," the court reaffirmed its "longstanding, albeit forgiving, proscription against any attempts to define reasonable doubt to jurors." *Id.* at 5a-6a. The court also rejected petitioner's contention regarding the limitation placed on his closing remarks, explaining that the court had "consistently" allowed district courts to prohibit counsel from defining reasonable doubt in their arguments to the jury. *Id.* at 6a.

ARGUMENT

1. Although the reasonable doubt standard "is an ancient and honored aspect of our criminal justice system," *Victor* v. *Nebraska*, 114 S. Ct. 1239, 1242 (1994), this Court has noted that "attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury," *Holland* v. *United States*, 348 U.S. 121, 140 (1954). [4] For that reason, many courts of appeals have expressed the view that the "purposes of having juries may be best served if juries, in the first instance, bear the responsibility for defining" reasonable doubt. *E.g.*, *United States* v. *Taylor*, 997 F.2d 1551, 1558 (D.C. Cir. 1993); *United States* v. *Nolasco*, 926 F.2d 869, 871-873 (9th Cir.) (citing cases), cert. denied, 112 S. Ct. 111 (1991).

That approach is consistent with this Court's recent decision in *Victor* v. *Nebraska*, in which the Court stated:

> The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Indeed, so long as the court instructs the

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[4] This case illustrates that point nicely. The instruction requested by petitioner defined "reasonable doubt" as, *inter alia*, "a doubt which would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life." C.A. App. 24. Petitioner contends that the district court's refusal to give that instruction was constitutional error. Justice Ginsburg and other federal jurists, however, have specifically criticized the "hesitate to act" formulation as unhelpful and confusing to the jury, and potentially prejudicial to the defendant. See *Victor* v. *Nebraska*, 114 S. Ct. at 1252 (Ginsburg, J., concurring in part and concurring in the judgment).

> jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury.

114 S. Ct. at 1243 (citations, brackets, and internal quotation marks omitted).

The court's jury instructions in petitioner's case suffered from no constitutional infirmity. In instructing the jury, the district court mentioned the reasonable doubt standard at least 18 times and was careful to explain that the government bore the burden of proof. C.A. App. 222-251. The court stated, for example, that:

> As a result of the defendant's plea of not guilty, the burden is on the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant for the simple reason that the law never imposes upon a defendant in a criminal case, the burden or duty of calling any witness or producing any evidence.
>
> The law presumes the defendant to be innocent of all charges against him. I therefore instruct you that the defendant is presumed by you to be innocent until such time, if ever, you as the jury are satisfied that the government has proven him guilty beyond a reasonable doubt.
>
> The defendant begins the trial here with a clean slate. This presumption of innocence alone is sufficient to acquit a defendant unless you as jurors are unanimously convinced beyond a reasonable doubt

> of his guilt, after a careful and impartial consideration of all of the evidence in this case. If the government fails to sustain its burden, you must find the defendant not guilty.
>
> This presumption was with the defendant when the trial began and remains with him even now as I speak to you and will continue with the defendant into your deliberations unless and until you are convinced that the government has proven his guilt beyond a reasonable doubt.

Id. at 225-226. The court went on to instruct, *inter alia*, that the government was required to establish each element of petitioner's charged offenses "beyond a reasonable doubt," *id.* at 227, 237-240, and that the jury must find petitioner not guilty if it was not convinced of his guilt "beyond a reasonable doubt" after weighing all the evidence, *id.* at 227. These instructions correctly apprised the jury of the government's burden of proof and "conve[yed] the concept of reasonable doubt to the jury." *Victor* v. *Nebraska*, 114 S. Ct. at 1243.

Nor is this Court's review warranted to resolve "a conflict among the federal Courts of Appeals" (Pet. 19) on whether a definition of reasonable doubt should be provided when requested by a defendant. Although various federal courts of appeals and state courts have given different directions to trial courts within their jurisdictions regarding whether to define the term "reasonable doubt" and what verbal formulations to use,[5]

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[5] The majority of the federal courts of appeals to consider the issue have either discouraged defining the term or have left the matter to the discretion of the trial court. See, *e.g.*, *United States* v. *Reives*, 15 F.3d 42, 44 n.1, 45 (4th Cir.) (condemns giving

this Court made clear in *Victor* that the Constitution does not require that the term be defined or that any particular formulation be used. 114 S. Ct. at 1243.[6] Nor do the differences in the prescribed verbal formulations among the lower courts call for this Court's review. Preferences as to the appropriate language to be used to define a term such as reasonable doubt—when the choices are all within constitutionally permissible bounds—are matters properly left to the individual choice of the lower appellate courts in the exercise of their supervisory powers over the trial courts within their jurisdictions.

2. There is no merit to petitioner's assertion (Pet. 15) that the district court refused to permit him to present "any meaningful argument to the jury on the meaning of

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definition but leaves decision to do so with trial court), cert. denied, 114 S. Ct. 2679 (1994); *United States* v. *Taylor*, 997 F.2d 1551, 1557-1558 (D.C. Cir. 1993) (district court "need not give any definition of reasonable doubt at all"); *United States* v. *Nolasco*, 926 F.2d 869, 872 (9th Cir.) (definition is permissible but not required) (en banc), cert. denied, 112 S. Ct. 111 (1991); *United States* v. *Olmstead*, 832 F.2d 642, 646 (1st Cir. 1987) (instruction using words "reasonable doubt" without further definition adequately apprises the jury of the proper burden of proof), cert. denied, 486 U.S. 1009 (1988); *Thompson* v. *Lynaugh*, 821 F.2d 1054, 1060-1061 (5th Cir.), cert. denied, 483 U.S. 1035 (1987); *United States* v. *Lawson*, 507 F.2d 433, 442 (7th Cir. 1974) (trial judge has option to define), cert. denied, 420 U.S. 1004 (1975); cf. *Whiteside* v. *Parke*, 705 F.2d 869, 871-872 (6th Cir.) (using "totality of circumstances" approach to determine whether failure to define was constitutional violation), cert. denied, 464 U.S. 843 (1983).

[6] Of course, this Court's decision in *Victor* does not prevent the States from requiring, as a matter of their own law, that such an instruction be given. Nor did the Court forbid district courts to give such instructions in federal criminal trials; it simply made clear that instructions of the sort requested by petitioner are not constitutionally required.

the reasonable doubt standard" and thereby abridged his constitutional rights. The record shows (C.A. App. 213-217) that, far from being prevented from making his point, petitioner was permitted to present an extensive closing argument in which he repeatedly asserted that the government had failed to overcome his presumption of innocence by proving his guilt "beyond a reasonable doubt." Because it is the role of the court, not counsel, to explain the law to the jury, the district court's refusal to allow petitioner to argue his own definition of reasonable doubt fell well within the court's broad discretion to control closing argument in order to ensure "that [it] d[id] not stray unduly from the mark." *United States* v. *Wables*, 731 F.2d 440, 449 (7th Cir. 1984), quoting *Herring* v. *New York*, 422 U.S. 853 (1975); *United States* v. *Crockett*, 813 F.2d 1310, 1317 (4th Cir.) (no abuse of discretion in trial court's refusal to allow defendant to define reasonable doubt in closing argument), cert. denied, 484 U.S. 834 (1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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